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CHARLES ELMORE CR

No. 349.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

AMERICAN CHICLE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Opinions Below.

The opinion of the United States Board of Tax Appeals (R. 19-29) is reported in 23 B. T. A. 221. The memorandum opinion of the Board (R. 42-44) accompanying its order denying respondent's motion for reconsideration and modification of the decision is not reported. The opinion of the Circuit Court of Appeals (R. 57-58) is reported in 65 Fed. (2d) 454.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 15, 1933 (R. 58-59) and the petition for a writ of certiorari was filed August 15, 1933. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Did respondent, American Chicle Company, realize taxable income upon the purchase at less than their face value of bonds of Sen Sen Chiclet Company, which bonds it had theretofore assumed in connection with the purchase of the assets of the Sen Sen Chiclet Company?

Statutes and Regulations.

"Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 233. (a) In the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in sections 213 and 217 * * * (U. S. C. App., Title 26, Sec. 985).

Sec. 213. For the purpose of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal services * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or in-

terest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * * (U. S. C. App., Title 26, Sec. 954)."

The above provisions are a re-enactment of the like numbered sections of the Revenue Acts of 1921, c. 136, 42 Stat. 227, and 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sections 985 and 954).

"Treasury Regulations 69:

Art. 545. *Sale and retirement of corporate bonds.*—(1) (a) If bonds are issued by a corporation at their face value, the corporation realizes no gain or loss. * * * (c) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year."

The above Regulations are the same as those contained in Article 545 of Treasury Regulations 62 and 65 issued under the Revenue Acts of 1921 and 1924.

Statement.

The facts were stipulated before the United States Board of Tax Appeals (R. 21-25) and the summarization thereof and the statement of the case contained in the petition for the writ (p. 2-4) are not controverted.

Argument.

Aside from the usual claim that the case is highly important, the reasons assigned by petitioner for the granting of a writ of certiorari are:

> (1) That the decision of the court below is in conflict with the decision of this court in *U. S.* v. *Kirby Lumber Co.*, 284 U. S. 1, and
>
> (2) That the decision of the court below is in direct conflict with that of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Coastwise Transportation Corporation*, 62 Fed. (2d) 332.

No Conflict with Decision in Kirby Lumber Co. Case.

The situation presented here is entirely different from that considered by this court in *U. S.* v. *Kirby Lumber Co.*, *supra*. In the latter case the taxpayer issued its bonds for money and in the same year purchased some of them for less than the issuing price. The difference was held to be taxable income since it represented a "clear gain," realized within the taxable year. However, in the present case, the taxpayer was not a borrower of money but was a purchaser of property, the obligation on the bonds which were subsequently purchased for less than their face value having been incurred as part of the purchase transaction. Furthermore the property so acquired was still held by the taxpayer during the taxable years and therefore no taxable gain or loss thereon was realized.

The facts show that in 1914 the taxpayer acquired the assets and property of the Sen Sen Chiclet Company, taking them subject to the liabilities of that company among

which were $2,450,000 par value of bonds (R. 21). During the taxable years the respondent discharged its liability on bonds having a face value of $342,500 for $289,399.65 (R. 21-24), a difference of $53,100.65, which the Commissioner of Internal Revenue held to be a taxable gain.

The Board of Tax Appeals reversed the holding of the Commissioner and, in affirming the decision of the Board, the court below states most clearly and succinctly the distinction between the present case where the bonds were assumed in connection with the purchase of property and the *Kirby Lumber Co.* case where the taxpayer had issued its bonds for money. The following is quoted from the decision (R. 58):

> "We can see no difference between bonds retired in the same year and later; nor between those issued in payment for property, and an existing mortgage assumed by the buyer when the property is transferred. But the distinction does seem to us critical between obligations whose consideration is money, and those issued or assumed for property which the obligor still holds. Every increase in the value of property might indeed be treated as a 'gain,' though that would involve appraising taxpayers' property each year; but such is not the notion underlying our system of taxation. The gain must be 'realized,' either by a sale of the property for money, or by its exchange for something else. Section 935, title 26, U. S. Code (26 U. S. C. A., §935). When a taxpayer gets money by issuing an obligation which he later discharges for less than its face, the transaction is completed, because money need not be sold or exchanged to be 'realized.' So we read United States *v.* Kirby Lumber Co., *supra,* 284 U. S., 1, 52 S. Ct. 4, 76 L. Ed. 131. But if he buys property by an obliga-

tion in the form of a bond, note, or the like, and if it remains in kind after the debt is paid, there can be no 'gain.' The cost has indeed been definitively settled, but that is only one term of the equation; as long as the other remains at large, there is no 'realized' gain.

No Real Conflict exists at this time between decision of Court below and those of any other Circuit Court of Appeals.

As a further reason for the granting of the writ petitioner alleges that a conflict exists between the decision of the Court below and that of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Coastwise Transportation Corporation, supra.* The taxpayer there acquired a fleet of ships and in part payment of the purchase price issued its serial notes, which it later retired at less than the face value. The Circuit Court of Appeals held the difference to be taxable income and reversed the decision of the Board of Tax Appeals, remanding the case for a new hearing on the facts. Upon the evidence presented at the rehearing the Board found that the transaction as a whole was a loss, that the reduction in the purchase price of the notes did not affect a release of free assets previously offset by the obligation of the notes, and in its new decision promulgated July 21, 1933, 28 B. T. A. ....., held that under either the view of the First Circuit or that of the Second Circuit, as expressed in the present case, the taxpayer realized no taxable income upon the purchase of the notes.

In the petition for the writ the petitioner states (footnote 2, p. 8) that "an appeal has been authorized from the new decision of the Board, which is considered erroneous because of the failure to treat the retirement of the notes

as separate transactions in the years in which they occurred." This is the same error as is assigned in the petition (p. 8) with respect to the decision of the court below in the present case and it does not appear from an examination of the decision of the Circuit Court of Appeals in the *Coastwise Transportation Corporation* case that this specific question was either presented to or passed upon by that court. If this were not the case, it would seem unnecessary for the petitioner to take an appeal from the new decision of the Board.

It is submitted, therefore, that unless and until the First Circuit Court of Appeals decides that the issuance or assumption of bonds or notes for property, and the later retirement of such bonds or notes, constitute two independent transactions as contended for by petitioner, there is no real conflict existing between the decisions of the First and the Second Circuit Courts of Appeals. Any apparent conflict now existing may be dispelled when and if the specific question is presented to the First Circuit in the new appeal in the *Coastwise Transportation Corporation* case. In any event there do not seem to be sufficient grounds at the present time for issuing a writ in this case by reason of any conflict existing between the decisions of the Circuit Courts of Appeals.

Chicago, R. I. & P. Ry. Co. v. *Commissioner,* 47 Fed. (2d) 990 (C. C. A. 7th) certiorari denied 284 U. S. 618, and *Charleston & W. C. Ry. Co.* v. *Burnet,* 50 Fed. (2d) 342 (App. D. C.) cited and relied upon by petitioner deal with the recovery of expense items previously deducted in determining taxable income of a prior year and have no bearing whatever upon the question presented by this case. The decision of the court below in no way conflicts with these decisions.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be denied.

Dated, New York, September 8, 1933.

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